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No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY; VILLAGE OF BARTLETT;
AND CITIZENS AGAINST THE BALEFILL,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit**

BRIEF OF AMICI CURIAE ARID OPERATIONS, INC. AND THE CALIFORNIA MINING ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF FOR ARID OPERATIONS, INC. AND THE CALIFORNIA MINING ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF THE AMICI CURIAE[1]

Arid Operations, Inc. ("Arid") is the proponent of the Mesquite Regional Landfill (the "Landfill" or the "Mesquite Landfill"), a regional solid waste landfill under development in the California Sonoran Desert. Members of the California Mining Association ("CMA") include mining companies that

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[1] Pursuant to Rule 34.6, amici state (i) that no counsel for any party authored this brief in whole or in part; and (ii) that only Arid Operations, Inc. and members of the California Mining Association made monetary contributions to the preparation and submission of this brief. Pursuant to Rule 37(2)(a), letters from counsel for all parties consenting to the filing of this brief have been filed with the Clerk of the Court.

conduct exploration or mineral development activities in the same or similar desert regions. Recently, the United States Army Corps of Engineers ("Corps" or "Corps of Engineers") has claimed jurisdiction under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, over dry washes and erosional features throughout the arid desert regions in which the projects of these entities are located. Thus, the decision that the Court renders in this case will set the standard that the Corps and the United States Environmental Protection Agency ("EPA") will apply in future project permitting decisions that will affect Arid and the members of CMA. *Amici* therefore have a critical interest in the outcome of this case.

THE MESQUITE REGIONAL LANDFILL

The Mesquite Landfill site is located in eastern Imperial County, California, adjacent to the site of the existing Newmont Mesquite Gold Mine and Ore Processing Facility, as described below in this brief. The entire Mesquite Landfill site covers approximately 4,245 acres. The Landfill is located on an alluvial desert plain near the Algodones Dunes, about 6 miles southwest of Mount Barrow, California.

The Mesquite Landfill has been approved for the development of a 600 million-ton municipal solid waste landfill, with an expected operational life of 100 years. The Landfill has undergone extensive environmental studies and has received all necessary regulatory approvals, including a Conditional Use Permit from Imperial County; a Record of Decision approving an extensive land exchange with the U.S. Department of Interior, Bureau of Land Management ("BLM"); a "no jeopardy" opinion issued pursuant to the Endangered Species Act, 16 U.S.C. §§ 1521 et seq. ("ESA"), by the U.S. Fish and Wildlife Service ("USF&WS") for the desert tortoises which inhabit the area, as well as analogous

state action under the California Fish and Game Code; and a Solid Waste Facility Permit from the California Integrated Waste Management Board pursuant to California's EPA-approved implementation of the Resource Conservation and Recovery Act, codified within the Solid Waste Disposal Act at 42 U.S.C. §§ 6901 et seq. ("RCRA"). Issuance of these permits was preceded by comprehensive environmental studies completed under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA") and analogous state law.

Precipitation in the site tends to occur in short, intense but extremely rare storm events, with average *annual* rainfall of about 3.5 inches. These storm events often create new erosional features in the desert landscape, identified as "dry washes." As is typical for desert regions of the west, the site contains many of these interbraided dry washes. All dry washes within the site are at best "ephemeral," a term of art meaning that they convey surface flows only during and immediately following rare precipitation events. Otherwise, and as a general rule, these washes contain no water. There are no navigable or other surface waters at or anywhere near the Mesquite Landfill. In fact, all the ephemeral washes crossing the site drain toward the southwest, ultimately seeping quickly into the sandy soils or, in extreme storm events, flowing at most approximately 4 miles from the site into the Algodones sand dunes, where they evaporate. Thus, the washes are hydrologically isolated, meaning that they have no connection on the upstream or downstream side with any other waters.

The Corps has nonetheless determined that over 338 acres of the dry desert washes within the 4,245-acre site, or nearly 10% of this stark desert landscape, constitute "waters of the United States." The fact that such a significant portion of this essentially waterless land could be subject to the Corps's claimed jurisdiction under the Clean Water Act

illustrates how far the Corps has gone in stretching its jurisdictional boundaries.[2] The effect of the Corps finding this acreage of "waters of the United States" is that the Corps thereby gains control over the entire project.

MINE PROJECTS OF CMA MEMBERS

A number of desert mining projects operated by various CMA members have been subject to similar expansive jurisdictional claims by the Corps. For example, the Mesquite Gold Mine and Ore Processing Facility (the "Mesquite Mine"), which is owned by CMA member Newmont Mining Corp., is located adjacent to the Mesquite Landfill. The Mesquite Mine is an active precious metal mine that has been in operation for nearly two decades. Throughout the 1980s, the Mesquite Mine disturbed over 4,000 acres of land under the strict supervision of several state and federal governmental agencies. The Corps during this period did not assert Section 404 jurisdiction over the project, and indeed in commenting on NEPA documentation required for the project in 1984, the Corps specifically disavowed any jurisdiction over the site and declined to comment further. Yet, in recent years, as in the instant case below, the Corps has begun to shift its position and claim Section 404 jurisdiction over desert washes within the arid

[2] As a result of a negotiated resolution, A[illegible] Operations agreed with the Corps to obtain a Clean Water Act § 404 permit for certain ancillary facilities (such as roads) to be constructed in connection with the Landfill. This result, where no permit was demanded for the Landfill itself, stemmed from the decision in *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998) (RII), which held for several reasons that the Corps has no regulatory authority under Section 404 over solid waste landfills permitted under RCRA Subtitle D. In a recent Notice of Proposed Rulemaking, however, the Army Corps has asserted that it intends in the future again to assert jurisdiction over permitted landfill operations, notwithstanding the RII decision. 65 Fed. Reg. 21291 (April 20, 2000).

project site as "waters of the United States" and has demanded Section 404 permits relating to recent exploration and development activities proposed for the site. Due to the substantial cost, delay and uncertainty involved in attempting to challenge Corps jurisdiction, Newmont has agreed under protest to obtain such permits from the Corps.

Similarly, the Imperial Project Mine (the "Imperial Project") is located entirely within the arid Sonoran Desert region, and yet has also been subject to far-reaching jurisdictional claims and demands by the Corps. Glamis Imperial Corporation, a member of CMA, is the project proponent. The Imperial Project is a proposed open-pit gold and silver mining operation, which encompasses 1,631 acres within Imperial County, California.

Again using a combination of the Corps's expansive, "high water mark" approach to identifying "waters," as described below in this brief, and the Corps's Migratory Bird Rule, EPA and the Corps have asserted that the Imperial Project area contains 114.5 acres of dry washes within the project area that constitute "waters of the United States." As a result, the agencies have required a Section 404 permit for the entire project. Among the resulting analyses required for this project was an identification of all potential alternative areas in the western United States that would be reasonable to consider in locating a gold and silver mine, and a demonstration that the project as proposed met with EPA's asserted criteria that "only projects that absolutely need to be sited in waters are authorized." EPA, Comment Concerning Public Notice No. 96-20083-TCD (June 26, 1998). Thus, under the Corps's current policies and interpretations, EPA and the Corps have required a project in the middle of the driest desert in the country to justify itself as a project to be sited "in waters." In fact, EPA went so far as to describe the ephemeral desert washes at the Imperial Project area as Aquatic Resources of National Importance.

These examples, unfortunately, are not isolated but rather are representative of numerous sites throughout the arid West where the Corps has employed its open-ended Migratory Bird Rule and related policies to claim regulatory authority over vast areas of ephemeral desert drainages.

The extent of the Corps's expansive claims is staggering. The Sonoran Desert as a whole, which encompasses the above and other similar projects, is over 200,000 square miles (128 million acres). Of this area, 6,200 square miles (3,968,000 acres) are located in Southern California. Desert washes are relatively common features in this landscape, encompassing approximately 10 percent of the total Sonoran Desert land area. It is estimated that between 317,440 and 396,800 acres of ephemeral washes occur within the Southern California portion alone of the Sonoran Desert. Consistent with the Corps's view of the Mesquite Landfill and the mining projects noted above, the Corps could assert jurisdiction over any project that could affect any portion of these washes – indeed it is difficult to imagine a project of any scope that would not affect them. In essence, the Corps sees itself as having jurisdiction over the entire desolate and typically waterless area.

SUMMARY OF THE ARGUMENT

The Corps's construction of the term "waters of the United States" is unreasonable and improper, in part, because it renders the key term "waters" superfluous. Under the Corps's interpretation of this statutory jurisdictional threshold, it is the presence of erosional features on normally arid landscapes, and the presence of certain plants and wildlife – not water – that purportedly triggers the Corps's Section 404 jurisdiction. The Corps has expanded its interpretation of the Clean Water Act in such a manner as to now claim jurisdiction over every area that contains not just

a body of water, but also any drainage or erosional feature where the Corps might, for example, find even some potential or temporary presence of a migratory bird or ESA-protected species. Of course, almost every erosional feature nationwide, no matter how dry or desolate, can be made to fit this extreme and improper interpretation of the language of the Clean Water Act.

Amici urge this Court to consider the Seventh Circuit opinion below in light of three points. First, this extraordinary result, where the Corps regulates projects in one of the driest regions on earth based upon the Clean Water Act, cannot be squared with the plain language of the Clean Water Act, yet it is a logical extension of the reasoning of the Seventh Circuit opinion. It cannot seriously be argued that Congress, in adopting the Clean Water Act, saw itself as conferring jurisdiction on the Corps to regulate nearly waterless stretches of desert landscape. Second, the opinion below failed to evaluate the practical effect of the Corps's claimed jurisdiction under the Clean Water Act and, therefore, improperly endorsed a jurisdictional approach that has significant potential to harm individuals and companies like *amici* through spurious regulation by the Corps. Third, in light of the manner in which the Corps has gradually expanded its definition of the term "waters of the United States," through a series of significant conceptual shifts, deference to the Corps's interpretation in this litigation would not be appropriate.

ARGUMENT

I. THE CORPS'S IMPROPERLY BROAD CONSTRUCTION OF THE CLEAN WATER ACT HAS LED THE CORPS TO REGULATE DRY DESERT WASHES AND OTHER ARID LANDS, DESPITE THE PLAIN LANGUAGE OF THE ACT.

The Army Corps of Engineers has gradually and improperly expanded its jurisdiction over "waters of the United States" in such a manner that now virtually every land area which drains or is crossed by water, even sporadically, falls within that claimed jurisdiction. The extremity of the Corps's view of its jurisdiction is illustrated by the experience of Arid and the members of the CMA in attempting to complete projects in remote regions of the desert, where the Corps, incredibly, has asserted that dry desert washes constitute "waters of the United States" subject to Section 404 jurisdiction.

A. The Corps Has Claimed Jurisdiction Over "Waters" That Contain No Water.

The experiences of these *amici* graphically illustrate that the approach taken by the Corps has resulted in the assertion by the Corps of jurisdiction over non-aquatic areas that is unreasonable and contrary to the meaning of the Clean Water Act. It is undisputed, for example, that the Mesquite Landfill site contains no wetlands, ponds, streams, or other water bodies. There is no surface water connection between the site and any wetland, pond, stream, or other water body. In fact, there is no water to be found in the site at all, except on a highly irregular and temporary basis. The only water-related features that exist in the site are hydrologically isolated dry washes, which temporarily transmit storm water.

In any year, these washes will hold water for only a few hours – perhaps only for a few minutes.

Just how does the Corps reach its determination that a dry desert wash is a "water of the United States," thereby claiming jurisdiction under the Clean Water Act? In arid areas like the Sonoran Desert, the answer has two components.

First, the Corps has concluded that erosional features in the desert landscape should be considered "waters" because they purportedly contain an "ordinary high water mark" or OHWM, even where the water that creates these features generally is present only during extremely rare and short storm events. Indeed, under the Corps's current regulations and policies, the jurisdictional extent of "waters of the United States" encompasses all areas displaying visible signs of water flow, extending laterally to OHWM, and upstream to that point where the OHWM is no longer perceptible. 33 C.F.R. § 328.4. The OHWM, in turn, is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area." 33 C.F.R. § 328.3. Thus, even though water generally is not present in the Sonoran Desert, the Corps asserts jurisdiction over dry washes in this area in part because, during the infrequent occasions when storm water run-off passes through, it erodes the dusty landscape in the prescribed manner, purportedly creating the requisite "high water mark." The problem with this approach, of course, is that there are virtually no drainage or erosional features, no matter how shallow or minor, that fail to meet this minimal "test," and indeed such erosional features can be created by just one or two storm events. Storm water run-

off flowing down the smallest gully or rivulet, no matter how briefly, will virtually always leave some mark of its passing.

Second, under the overbroad Migratory Bird Rule at issue in this case, the Corps has concluded that these dry desert wash "waters" are or could be a habitat for migratory birds that cross state lines, or that they are or could be a habitat for species listed as "threatened" or "endangered" under the ESA. Corps guidance documents have interpreted the Clean Water Act to include any waters that "*could be* used" by migratory birds or species listed under the ESA as regulated waters. Memorandum on Clean Water Act Jurisdiction Over Isolated Waters, from Brigadier General Patrick Kelly to District Offices, (November 8, 1985) ("Kelly Memorandum") (emphasis supplied).[3]

In a desert region, this interpretation does not require that surface water be present in the area at all. Water must be present, possibly solely below the surface, just often enough for plant communities to survive that "could" provide "habitat" for migratory birds passing through the area -- regardless of whether the birds in fact use the area as habitat (significantly, the phrase "could be" does not require that the Corps determine that the area in fact provides a habitat for migratory birds). In the case of the Mesquite Landfill, the Corps claims that the ephemeral desert washes that cross the site fall within this definition due to the presence within the washes of desert microphyll woodland and creosote bush scrub plant communities that could be used by birds that migrate through the Lower Colorado and Sonoran deserts. In addition, although the site is not "critical

[3] The Kelly Memorandum was set aside as in violation of the Administrative Procedure Act in an unpublished decision, *Tabb Lakes, Ltd. v. United States*, 20 Envtl. L. Rep. 20008 (4th Cir. 1989). EPA and the Corps have issued a joint memorandum stating that they will follow *Tabb Lakes* only within the Fourth Circuit.

habitat" as defined in the ESA, the desert tortoise (*Gospherus agassizii*) is known to occur there.[4]

These dry desert washes contain no water on even an infrequent basis, and they contain no unique resources that do not occur on thousands of acres of similar topography in this region. Yet, the washes and desert erosional features are sufficient, under the Corps's approach, to confer jurisdiction upon the agency. By this circuitous route, the Corps has reached the conclusion that it has Clean Water Act jurisdiction over a project undertaken in the most arid stretch of the American landscape. Using this reasoning and policies, the Corps could assert such jurisdiction over virtually any construction activity in this or similar desert regions.

B. The Assertion of Corps's Jurisdiction Offends Common Sense Expectations of Project Proponents.

The Corps's assertion of Clean Water Act jurisdiction, in the absence of water, is so offensive to common sense interpretations of the Act that it has wreaked havoc on projects in the desert regions where Arid and CMA's members have attempted them. During the first seven years of the permitting process for the Mesquite Landfill, for example, neither the Corps nor EPA asserted

[4] The Mesquite Regional Landfill site was not included in areas designated by the USF&WS as "Critical Habitat" and therefore was not included in designated "Desert Wildlife Management Areas" in the USF&WS Desert Tortoise Recovery Plan. The Landfill project incorporates numerous mitigation measures designed for conservation of the desert tortoise and its habitat, a key component of which is the acquisition of high quality "critical" desert tortoise habitat through a transfer of exchange and compensation lands from private into federal ownership.

that the project site contained "waters of the United States," even though the presence of desert tortoises and plant communities suitable for use by migratory birds was well known. In fact, the project had been the subject of regulatory approvals issued by EPA itself, as well as by the USF&WS. Moreover, the Mesquite Landfill had participated in an extensive land exchange with the federal government, in which the historically disturbed, low-quality tortoise habitat on federal lands was exchanged for high quality tortoise habitat on private lands, at the cost of millions of dollars to Arid. That federal land exchange was reviewed under NEPA and analyzed by the BLM, USF&WS, EPA, and other agencies.[5] Indeed, the federal district court upholding the land exchange associated with the project was compelled to remark,

> The exchange also has a positive impact on the environment by improving the biological integrity of the threatened desert tortoise population. BLM stands to acquire 3,656.1 acres of Category I Desert Tortoise Habitat to compensate for the loss of Category III Desert Tortoise Habitat (lower quality) within the Mesquite Regional Landfill Project.

Desert Citizens Against Pollution v. Bisson, 954 F. Supp. 1430, 1440 (S.D. Cal. 1997) (currently on appeal before the Ninth Circuit, Case No. 97-55429).

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[5] The exchange was also challenged by an environmental group and upheld by a federal district court. *Desert Citizens Against Pollution v. Bisson*, 954 F. Supp. 1430 (S.D. Cal. 1997) (currently on appeal before the Ninth Circuit, Case No. 97-55429.)

At no time during this extensive federal permitting process did EPA, the Corps, or any other agency suggest that the dry desert washes within the site might constitute "waters of the United States" requiring an additional permit under Section 404. Similar to the instant case, only after all other regulatory approvals had been granted following six years of studies, the Corps suddenly and surprisingly claimed jurisdiction for the first time based solely on the erosional features of the landscape and the occasional presence of migratory birds and ESA species, although these drainages and creatures had already been the subject of intense regulatory attention.

One need not peruse exhaustively the text of the Clean Water Act to realize that this result cannot be squared with the plain language of the legislation, which nowhere suggests that the statute was to provide the Corps with jurisdiction over broad areas of essentially waterless landscape. Indeed, the oft-repeated purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. One might expect that if Congress had intended the legislation to restore and maintain the biological integrity of the Nation's deserts, it would have done so with express language. Not one word or phrase of the statute can be construed as providing such protection. Yet, this is precisely the result that the Army Corps has reached through steady expansion of its jurisdiction during the decades since the statute was enacted.

II. THE SEVENTH CIRCUIT FAILED TO EVALUATE THE PRACTICAL EFFECT OF APPROVING THE CORPS'S CLAIMED JURISDICTION OVER ISOLATED AND EPHEMERAL WATERS.

The opinion below failed to acknowledge the validity of Petitioner's claims that the approval of the Corps's broad assertion of jurisdiction over isolated waters would lead to the Corps possessing virtually unlimited jurisdiction. The Seventh Circuit correctly acknowledged that

> [t]he United States is home to somewhere between 2.5 and 6 billion birds, two-thirds of which migrate. Virtually any body of water could serve as a temporary habitat for at least some of these birds.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers et al., 191 F.3d 845, 850 (7th Cir. 1999). However, the Seventh Circuit then failed to carry this statement through to its logical conclusion, stating "any suggestion that next the Corps will be trying to regulate the filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it, misses the point." *Id.*

This suggestion, which the Seventh Circuit apparently considered outlandish, has become the reality at the Mesquite Landfill Site and similar project sites in the western United States, where *the Corps already has asserted and will continue to assert jurisdiction over every "puddle" and dry wash.* Contrary to the expectation voiced in the Seventh Circuit's opinion, the Corps does *not* always make a factual determination that an area is actually used as habitat by migratory birds before asserting its jurisdiction. *See* 191 F.3d at 850; Kelly Memorandum (extending jurisdiction to

lands that "could be" habitat for migratory birds). Not only has the Corps sought to regulate every puddle that forms after a rainstorm, it has sought to do so in places like the Sonoran Desert, where puddles may only exist for a matter of hours, or in some cases merely minutes, out of each year. The Seventh Circuit simply failed to appreciate the scope of the jurisdiction the Corps already routinely asserts with respect to projects everywhere, including the deserts of the western states, or to compare the scope of this claimed jurisdiction with a reasonable construction of the Clean Water Act. The practical effect of the Seventh Circuit's decision will be continued regulation by the Corps of areas that are plainly beyond the reach of the Clean Water Act and which are more appropriately regulated by other federal and state agencies.

III. *CHEVRON* DEFERENCE IS INAPPROPRIATE WHERE THE CORPS'S LEGAL POSITION HAS CONTINUALLY SHIFTED OVER TIME.

An agency's construction of a statute it is charged with enforcing is normally entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, in the instant case this is not appropriate, because (1) the Corps's definition of "waters of the United States" arises from the judicial opinion issued in *Callaway*, and not the Corps's expert interpretation of the Clean Water Act; and (2) the Corps has shifted its definitional framework several times in the years since the *Callaway* decision, and has gradually expanded its jurisdiction through this process beyond any reasonable construction of the Clean Water Act. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (deference does not extend to "agency litigating

positions that are wholly unsupported by regulations, rulings, or administrative practice").[6]

The Corps's original interpretation of the Clean Water Act limited its jurisdiction to waters that were actually used in navigation or were susceptible to use to transport interstate or foreign commerce. 42 Fed. Reg. 37122, 37123 (July 19, 1977) (summarizing early history of Corps's interpretations of its jurisdiction). In *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), the Corps and the United States argued that the Corps's regulatory jurisdiction was limited to these traditionally navigable waters. *Callaway*, however, held that Congress intended the definition of waters of the United States to have the maximum scope that the Commerce Clause would allow. *Id.* at 686. The Corps chose not to appeal this district court opinion. Taking this direction from *Callaway*, the Corps issued interim final regulations in 1975 that redefined "waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce. 40 Fed. Reg. at 31320 (1975).

In practice, however, even this "second generation" interpretation by the Corps of "waters of the United States" retained some requirement of a physical or hydrological connection between a body of water and truly navigable water in order to support jurisdiction. For example, the Corps initially defined a "freshwater wetland" subject to its jurisdiction as an area that was "adjacent to" a regulated

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[6] In ancient Rome, according to Dio Cassius, the Emperor Caligula was said to have tormented Roman citizens by printing obscure laws at the top of tall columns, and then punishing unsuspecting citizens who failed to comply with them. Blackstone, Commentaries on the Laws of England, 1765-69, Vol. 1, Introduction, Section II. The Corps has accomplished a modern version of this unfair practice.

body of water. 42 Fed. Reg. at 37123 (July 19, 1977). *See Riverside*, 474 U.S. 121 (upholding regulations). The rationale behind extending the definition to include these connected waters was that "[w]ater moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system." *Riverside*, 474 U.S. at 134, *quoting* 42 Fed. Reg. at 37128. Thus, water that was not itself navigable or usable in interstate commerce fell within the Corps's jurisdiction only if dredge and fill activities in that water affected, or had potential to affect, the quality of water that was navigable or usable in interstate commerce. This Court upheld this definition because the Court could not state that the definition was unreasonable. 474 U.S. at 134.

As in many things, this interpretation took on a different shade of meaning in the arid stretches of the American West, where the Corps successfully argued in a number of reported decisions that any area that formed a surface water connection, if only on a seasonal or intermittent basis, with a water that was navigable in fact constituted a water of the United States, even if the upstream area was typically dry. *See, e.g., Quivira Mining Co. v. United States Environmental Protection Agency*, 765 F.2d 126, 130 (10th Cir. 1985) (normally dry arroyos are "waters of the United States" where they are tributary to navigable water); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975) (same). These decisions represent a significant stretch of the Corps's jurisdiction beyond the concern of the Clean Water Act with protecting the nation's waters because the probability that the tributary arroyos considered in these decisions could actually affect the quality of the nation's waters was exceedingly small. Certainly, dry arroyos are one step removed from the wetlands upheld as

waters of the United States in *Riverside Bayview Homes*. However, these decisions, citing deference to the Corps's expertise, approved this extension as a reasonable one. As described in the factual backgrounds above, the Corps recently has gone well beyond these suspect cases by now claiming jurisdiction over even *non-tributary* dry washes and arroyos.

Contemporaneously with this Court's opinion in *Riverside Bayview Homes*, the Corps, through the Kelly Memorandum in 1985 and a preamble to a Notice of Final Rule in 1986,[7] began a still-more ambitious expansion of its jurisdiction through the Migratory Bird Rule. Though cast as a "clarification" of existing policy, 51 Fed. Reg. at 41217, the Migratory Bird Rule represented a major conceptual shift away from the rationale that certain waters deserved the protection of the Corps because of their potential to affect the quality of interstate waters or waters that were susceptible to use in interstate commerce. The dry desert washes the Corps now regulates pursuant to the migratory bird rule are fundamentally different from the arroyos and intermittent streams addressed in reported judicial decisions such as *Quivira Mining*, because the water bodies in those cases were tributary and flowed directly into other waters of the United States.

The result of this expansion has been that over a period of nearly thirty years, the Corps has gradually pushed the boundaries of its jurisdiction ever outward, moving from (1) waters which were navigable in fact to (2) waters (usually wetlands) that were hydrologically connected to interstate waters, and from there to (3) its present position, where the Corps now routinely asserts jurisdiction over land areas that typically contain no water, that have no physical connection to navigable waters, and where the presence of

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7 51 Fed. Reg. 41206 (November 13, 1986).

water is both isolated and ephemeral. The Corps's present construction of the term "waters of the United States" is now conceptually separated from any concern with water quality. Now, the rationale in support of the Corps's jurisdiction rests upon the presence of migratory birds or endangered species that "could" make use of a particular area of land, whether that land typically contains any water or has any hydrologic connection to permanent waters. The Corps's assertion of Section 404 jurisdiction in these areas amounts to a claim that virtually every land area over which water ever flows constitutes jurisdictional waters. This result is plainly unreasonable and should not be tolerated by this Court.

CONCLUSION

The Army Corps of Engineers has extended its jurisdiction well beyond the bounds of any reasonable construction of the Clean Water Act, as is illustrated by the Corps's claim of Section 404 jurisdiction over dry desert washes and erosional features in the California Sonoran Desert and similar arid regions of the country. The Corps's insidious expansion of its jurisdiction has occurred through successive reinterpretations of the otherwise plain phrase "waters of the United States." This Court should reject this approach and should not be misled by the apparent significance of the waters at issue in the instant case. Because the opinion below failed adequately to appreciate the extent of the jurisdictional grant it was approving, that opinion is deeply flawed and should be reversed or limited so that "waters of the United States" better comports with the text and meaning of the Clean Water Act.

Respectfully submitted,

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